

Remarks/Arguments

A. Summary of the Claims

Claims 1, 2, 5-9, 11, 14-20, and 23 are amended. Claims 3, 4, 13, 21, and 22 are canceled. Support for the amendments can be found throughout the specification and claims as originally filed.

Claims 1, 2, 5-12, 14-20, and 23 are pending.

B. Objection to the Drawing Is Overcome

The drawing are objected under 37 C.F.R. 1.83(a) for allegedly failing to show the structural details of the device including the sensors and the audio and visual system as described in the specification.

Applicant disagrees. The structure of the sensors and audio and visual systems described in the present invention is not essential for a proper understanding of the disclosed invention. For instance, a person of ordinary skill in the art would understand the invention in view of the current drawings. This is especially true where, as here, the structure of the sensors and audio and visual systems are known and understood by a person of ordinary skill in the art.

In view of the above, Applicant requests that the present objection to the drawings be withdrawn.

C. Claim Objections Are Overcome

Claims 1, 2, 7, 9, 11, 13, 14, 15, 16, 17, 19, 21, and 23 are objected to for various reasons. In an effort to further prosecution and secure prompt allowance, the claims have been revised at the suggestion of the Examiner. For instance, claim 14 is revised to refer to claims 2 and 9 in the alternative.

Applicant requests that the claim objections be withdrawn.

D. Indefiniteness Rejections Are Overcome

Claims 14, 15, 18, and 23 are rejected under 35 U.S.C. § 112, second paragraph, for indefiniteness.

Applicant disagrees. The claims, prior to any amendments made above, were definite and satisfied the requirements under § 112, second paragraph. A person of ordinary skill in the art could understand these claims when read in light of the specification.

However, in an effort to further the prosecution and secure prompt allowance, the claims have been amended at the Examiner's suggestion. For instance, claims 14 and 15 replace "it" by what it is intended for. Claim 18 replaces "the alarms" by "the alerts", which has a proper antecedent basis in claim 17. Claim 23 includes additional steps pertaining to how the activity and comfort monitoring is achieved.

Therefore, Applicant requests that the indefiniteness rejections under 35 U.S.C. § 112, second paragraph, be withdrawn.

E. Anticipation Rejections Is Overcome

Claims 1-8, 16, 17, and 19-23 are rejected under 35 U.S.C. § 102(e) as being anticipated by Lehrman *et al.*

Applicant disagrees. The claims prior to any amendments made above were not anticipated by the cited references. The present claims are also not anticipated by the cited references. However, in an effort to further the prosecution and secure prompt allowance, independent claims 1 and 9 have been amended to include the subject matter of non-rejected claim 13. Independent claim 23 has also been amended to recite a similar limitation. Therefore, the present anticipation rejections are rendered moot.

Applicant requests that the anticipation rejections be withdrawn.

F. Obviousness Rejection Is Overcome

Claims 9-13 and 18 are rejected under 35 U.S.C. § 103(a) as being obvious over Lehrman *et al.* in view of Sullivan *et al.*

Applicant disagrees. The claims prior to any amendments made above were not rendered obvious by the cited references. The present claims are also not rendered obvious by the cited references.

1. Standard for Establishing a *Prima Facie* Case of Obviousness

To establish a *prima facie* case of obviousness, the Examiner must show: (1) the prior art reference teaches or suggests all of the claim limitations; (2) some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify or combine the reference; and (3) a reasonable expectation of success that such modifications or combinations would work. MPEP § 2142; *see also In re Vaeck*, 947 F.2d 488 (Fed. Cir. 1991). With respect to the motivation to combine the references, the MPEP states “[t]he mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination.” MPEP § 2143.01. If any one of the three elements is missing, a *prima facie* case of obviousness cannot be established.

2. A *Prima Facie* Case of Obviousness Has Not Been Established

It is well settled that “[t]he examiner bears the initial burden of factually supporting any *prima facie* case of obviousness. If the examiner does not produce a *prima facie* case, the applicant is under no obligation to submit evidence of non-obviousness.” MPEP § 2142.

i. The Cited References Fail to Disclose All the Elements Recited

Lehrman *et al.* fails to teach or suggest allowing a person in charge of the at least one subject to be informed of a state thereof, and said activity modulator allows the person in charge to order a retroaction according to at least a state of the at least one subject. Sullivan *et al.* fails to provide the deficiency. Sullivan *et al.* is directed towards passive physiological monitoring of patients vital signs. However, Sullivan *et al.* fails to teach or suggest, or provide motivation to teach or suggest allowing “a person in charge of the at least one subject to be informed of a state thereof, and said activity modulator allows the person in charge to order a retroaction according to at least a state of the at least one subject.”

Additionally, the Office contends that Lehrman *et al.* discloses in column 9 line 40 through column 10, line 67, allowing a person to be informed of a state of the subject to order a retroaction according to the state of the at least one subject. See page 7 of the Office Action mailed April 4, 2006. This contention is incorrect.

Lehrman *et al.* discloses providing sensors to detect, for example, breathing sensors, ECG sensors, and the like. See column 10, lines 1-28. When these sensors detect an output signal that is dangerous or critical, an alarm is activated. See *id.* However, the alarm may be disabled by the user or alternatively, may initiate a call for remote notification. See column 10, lines 58-61. This cannot be construed as allowing a person in charge of the at least one subject to be informed of a state thereof, and said activity modulator allows the person in charge to order a retroaction according to at least a state of the at least one subject. Applicant assert that Lehrman *et al.* is silent to any retroaction order by a person in charge.

The cited references, individually, or in combination, fail to disclose all the elements of the recited claims. For at least this reason, a *prima facie* case of obviousness has not been established.

ii. *There is No Motivation to Combine or Modify the Cited References*

Neither the Sullivan *et al.* reference nor the Lehrman *et al.* reference suggest or motivate the combination being proposed by the Office. Sullivan *et al.*, appears to be concerned with the acquisition of physiological signals in a challenging environment characterised by high noise and vibration such as a helicopter environment by using a piezoelectric sensor. In particular, Sullivan *et al.* discloses developing a passive sensor array system that monitors biological/physiological signals by detecting and reducing noises and vibration interferences from surrounding environments. See column 5, lines 8-23. In contrast, Lehrman *et al.* discloses using sensors to detect the motion of a body relative to its environment, and in particular, changes in velocity/acceleration of the body in magnitude, direction, or both. See column 5, lines 17-25; see also FIGs. 1 and 4 and supporting text. Lehrman *et al.* does not disclose a need or desirability for sensors used to reduce the noises from the environment. Likewise, Sullivan *et al.* does not disclose a need or desirability sensors for evaluating motion of a body relative to the environment, but rather discloses detecting signals associated with a body without the noise and vibration interference from the environment.

Further, the Office contends that the combination of Lehrman *et al.* and Sullivan *et al.* to implement a “commonly used type of sensor” finds no support. It appears that the Office is suggesting that the use of a particular sensor is a mere design choice. In deriving its contentions, the Office is evidently proceeding with an impermissible hindsight analysis of the invention. To imbue one of ordinary skill in the art with knowledge of the instant invention, where no prior art

reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher. *W.L. Gore Assoc., Inc. v. Garlock, Inc.*, 220 USPQ 303, 312-313 (Fed. Cir. 1983).

In sum, there is no suggestion or incentive supporting the combination of the cited references—much less combining these references to teach or suggest the recite claimed elements. A second element necessary to establish a *prima facie* case of obviousness is therefore missing.

iii. *There is No Reasonable Expectation of Success that the Combinations of the Cited References Would Work*

A third element necessary to establish a *prima facie* case of obviousness requires a showing of a reasonable expectation of success that modifying or combining the cited references would work. However, there does not appear to be any evidence of record showing that a reasonable expectation of success exists.

Rather, the evidence suggests the opposite. For example, Lehrman *et al.* discloses sensors that uses the environment, defined as “conditions and the influences that determine the behavior of the physical system in which the body is located” to evaluate the movement of a body. (Column 2, lines 28-30 34). Modifying the sensors of Lehrman *et al.* reference to include the sensors of Sullivan *et al.*, which filters aspects of the environment, particularly filtering the noise and vibrational interferences of the environment, would undermine the teachings of Lehrman *et al.* If proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

Because all three requirements for establishing a *prima facie* case of obviousness have not been established, the present obviousness rejection cannot be maintained. Applicant requests that the present obviousness rejection be withdrawn.

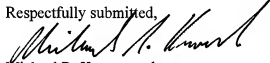
G. Conclusion

Applicant believes that the present document is a full and complete response to the Office Action mailed April 4, 2006. The present claims are in a condition for allowance, and such favorable action is requested.

It is believed that no fee is due for filing this document. However, should any fees under 37 C.F.R. §§ 1.16 to 1.21 be required for any reason relating to this document, consider this paragraph such a request and authorization to withdraw the appropriate fee from Fulbright & Jaworski Deposit Account No. 50-1212/GOUD:050US.

The Examiner is invited to contact the undersigned Attorney at (512) 536-3020 with any questions, comments or suggestions relating to the referenced patent application.

Respectfully submitted,



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